5-9-2012

State v. Latneau Appellant's Reply Brief Dckt. 38416

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38416
	)	
v.	)	
	)	
NOAH LATNEAU,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DARLA S. WILLIAMSON
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SHAWN F. WILKERSON
Deputy State Appellate Public Defender
I.S.B. #8210
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Latneau argued that the no contact order which prevents him from contacting his children is invalid because the district court failed to advise him that it could be ordered as a direct consequence of his guilty plea. Mr. Latneau also argued that the district court violated both his procedural and substantive due process rights because the no contact order unduly restricts his fundamental right to parent.

In response, the State argues that Mr. Latneau failed to establish fundamental error in regard to his guilty plea because the no contact order was merely a collateral consequence of the no contact order. Additionally, the State argued that Mr. Latneau failed to establish fundamental error in regard to his due process rights because he is unable to exercise his parental rights from prison and the district court said it would modify the no contact order to reflect the outcome of Mr. and Mrs. Latneau's divorce proceedings.

In rebuttal, Mr. Latneau argues that the no contact order is a direct consequence of his guilty plea because the Idaho Supreme Court has held that no contact orders entered as part of the sentencing proceedings are part of the criminal sentence. Concerning his due process arguments, Mr. Latneau can exercise his parental rights because he is on parole. Moreover, even if he were not on parole, inmates can exercise a panoply of parental rights while in prison. Further, the fact that the no contact order is subject to future modification is irrelevant because the no contact order is currently infringing on Mr. Latneau's fundamental right to parent.

Statement of the Facts and Course of Proceedings

After the Appellant's Brief and the Respondent's Brief were filed, the district court entered an order quashing the no-contact order in part.[1] From the face of that order, however, it appears that it is only applicable to the victim, Breena Latneau, and it does not affect the no contact order as it relates to Mr. Latneau's children. Therefore, the order quashing the no-contact order does not alter any of the issues on appeal.

Additionally, the Idaho Department of Corrections web page indicates that Mr. Latneau is currently on parole.[2] Due to this development, Mr. Latneau is withdrawing the third issue raised in the Appellant's Brief.

Otherwise, the statement of the facts and course of proceedings were previously articulated in Mr. Latneau's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

[1] The Order Granting Motion to Quash No-Contact Order is not in the appellate record. Accordingly, a motion to augment has been filed concurrently herewith.
[2] Mr. Latneau's parole status can be found by searching with his offender number, 97395, at https://www.accessidaho.org/public/corr/offender/search.html.

ISSUES

1. Did the district court's failure to advise Mr. Latneau that a no contact order prohibiting his contact with his children could be entered as a direct consequence of his guilty plea render the no contact order invalid?

2. Did the district court violate Mr. Latneau's procedural and substantive due process rights when it entered a no contact order which unduly restricts his fundamental right to parent?

3. Did the district court abuse its discretion when it relinquished its jurisdiction following Mr. Latneau's rider?[3]

[3] Mr. Latneau is withdrawing this issue from this Court's consideration.

ARGUMENT

I.

The District Court's Failure To Advise Mr. Latneau That A No Contact Order Prohibiting His Contact With His Children Could Be Entered As A Direct Consequence Of His Guilty Plea Rendered The No Contact Order Invalid

A. Introduction

Idaho Criminal Rule 11 requires a district court to warn a defendant about the direct consequences of a guilty plea. I.C.R. 11(c)(2). Mr. Latneau argued, in his Appellant's Brief, that his plea was invalid, as to the no contact order, because it was a direct consequence of his guilty plea and he was never advised at the change of plea hearing about the possibility of the no contact order. (Appellant's Brief, pp.4-5.) Mr. Latneau then argued that the appropriate remedy is to vacate the no contact order. (Appellant's Brief, pp.4-5.)

In response, the State argues that Mr. Latneau's failure to object to the no contact order prevents him from raising the issue on appeal because it does not constitute fundamental error. (Respondent's Brief, pp.4-7.) In support of this position, the State argues that the district court's failure to advise Mr. Latneau about the possibility of the no contact order did not violate Mr. Latneau's Constitutional rights because it was a collateral consequence of his guilty plea. (Respondent's Brief, pp.5-6.) The State also argues that the error was not clear because no case establishes that the possibility of a no contact order is the direct consequence of a plea. (Respondent's Brief, p.7.) The State goes on to argue that Mr. Latneau was not prejudiced because there is no evidence indicating that Mr. Latneau would not have pleaded guilty had he known about the possibility of the no contact order. (Respondent's Brief, pp.6-7.)

Mr. Latneau has established fundamental error, and more specifically, the no contact order is a direct consequence of Mr. Latneau's guilty pleas because the district court has total discretion to issue the no contact order and the Idaho Supreme Court has expressly held that a no contact order entered at sentencing is part of the sentence. In reliance on that case, Mr. Latneau also argues that the district court's error was clear as a matter of law. The State prejudice argument is without merit because it focuses on the change of plea hearing when the inquiry should be focused on the outcome of the rider review hearing because Mr. Latneau could not have objected to the request for the no contact order until the rider review hearing.

B. The District Court's Failure To Advise Mr. Latneau That A No Contact Order Prohibiting His Contact With His Children Could Be Entered As A Direct Consequence Of His Guilty Plea Rendered The No Contact Order Invalid

The State argues that Mr. Latneau must establish fundamental error before an appellate court in Idaho will evaluate his claim that the district court's no contact order is invalid because the court's failure to advise him about the possibility of the no contact order, when he entered his guilty plea. (Respondent's Brief, pp.4-7.) In order to establish fundamental error a defendant must demonstrate that:

> [O]ne or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

State v. Perry, 150 Idaho 209, 226 (2010).

On the first prong of the fundamental error standard, the State argues that Mr. Latneau's Constitutional rights were not violated because the possibility of the no

contact order is a collateral consequence of his plea, and Mr. Latneau need only be informed of the direct consequences of his guilty plea in order for his plea to be considered knowing, intelligent, and voluntary. (Respondent's Brief, pp.5-6.) In support of its position, the State relies on *State v. Heredia*, 144 Idaho 95 (2007). In that case, the Idaho Supreme Court articulated the following three factor test used to determine whether a consequence of a guilty is direct or collateral: "(1) the defendant's power to prevent the consequence; (2) the punitive or remedial nature of the consequence; and (3) the amount of control the sentencing judge has over imposing the consequence." *Id.* at 97-98.

While addressing the first factor, the State argues that Mr. Latneau can control the consequences of the no contact order because the district court stated that the no contact order was subject to the terms of Mr. and Mrs. Latneau's prospective divorce proceedings. (Respondent's Brief, p.6.) The State's argument is without merit because the "amount of control" discussion focuses on whether Mr. Latneau has done something which requires the district court to enter the no contact order. *See Heredia*, 144 Idaho at 97 ("The 'power to prevent' analysis infers that where a possible consequence is within the defendant's power to prevent, such as persistent violator status, it is collateral to a guilty plea"). The fact that the no contact order is potentially subject to future modification is a red herring and entirely irrelevant to the analysis of whether the initial entry of the no contact order was direct consequence of the guilty plea. If the State's argument was correct then the indeterminate portion of a sentence could be considered a collateral consequence of a guilty plea because it is subject to subsequent modification by the parole board. In fact, the entire sentence could be considered

collateral because it was subject to modification by an I.C.R. 35 motion. Here, Mr. Latneau as very little control over the divorce proceedings, especially since his wife can go forward with the proceedings over Mr. Latneau's objection.

The State argues that the no contact order is a not punitive and remedial in nature because it is intended to protect victims and provides criminal penalties for future violations. (Respondent's Brief, p.6.) The State's position is without merit because, the Idaho Supreme Court has held that no contact orders issued at sentencing are actually part of the sentence. In *State v. Jeppesen*, 138 Idaho 71 (2002) (*overruled on other grounds in Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889 (2011)), one of the issues on appeal was whether a magistrate judge had the authority to issue a permanent no contact order as part of the sentence for disturbing the peace?" *Id.* at 74 (emphasis added). That issue dealt with a magistrate's ruling "that Idaho Code § 18-920(1) authorizes the issuance of a permanent no contact order as part of the punishment for any criminal offense." *Id.* (emphasis added). On appeal, the State argued "the statute authorized the issuance of a permanent no contact order as an additional criminal penalty in any case in which a person was charged either with one of the listed offenses or with an offense for which the trial court finds that a no contact order is appropriate." *Id.* (emphasis added). The Supreme Court ruled that the permanent no court was invalid, because, under a prior version of I.C. § 18-920(1), no contact orders could only be issued as part of a pretrial release, and therefore, could not be issued as part of a sentence. *Id.* at 74-75. The Supreme Court's ultimate holding was as follows:

> For the above reasons, we hold that Idaho Code § 18-920(1), as it existed at the time of the offense in this case, provided only for the issuance of a

> no contact order as a condition of pre-trial release. Because Jeppesen has successfully served his period of probation, it would serve no purpose to remand this case for the magistrate judge to determine whether a no contact order should be a condition of Jeppesen's probation. A sentence that is in excess of that authorized by law is valid to the extent that the court had the jurisdiction and authority to impose it, and is void as to the excess if the valid portion is severable from that portion which is void. We therefore simply vacate the no contact order.

Id. at 75. The Court's reasoning for vacating the no contact order was based on its determination that the no contact order was a constituent part of the sentence and the remaining part of the sentence was valid. Therefore, the court vacated the no contact order as an invalid portion of the sentence. Since Mr. Latneau's no contact order was order at sentencing, it is punitive in nature because it is actually part of Mr. Latneau's sentence.

Concerning the third factor, the amount of discretion a sentencing judge has over the consequence, the State argues, "although the district court has some discretion in imposing the order the court effectively delegated the ultimate decision of contact to the divorce court." (Respondent's Brief, p.6.) However, the State's argument is inconsistent with the Idaho Supreme Court's analysis in *Heredia*, where it stated, "the 'amount of control' discussion by the Court infers that where a judge has no control over a consequence, such as mandatory registration on the sex offender watch list, it is collateral to a guilty plea." *Heredia*, 144 Idaho at 97. Here, the district court has total discretion, as opposed to the State's assertion of "some discretion," to impose a no contact order. *See* I.C. § 18-920(1).

Additionally, the actions of the divorce court have no bearing on the district court's initial determination to enter the no contact order. Although the district court said it would modify the no contact order in accordance with the terms of the divorce decree,

the court did not relinquish its jurisdiction over the no contact order. In fact, the district court stated, "[i]f a divorce decree determines otherwise then we can come back and modify that no contact order." (12/21/10 Tr., p.27, Ls.19-21.) Since the district court used the phrase "we can come back and modify," it is clear that the district court controls the no contact order. However, if the district court disagrees with the conclusion of the divorce court, it is not required, and cannot be compelled, to modify the no contact order.

On the second prong of the fundamental error standard, the State argues that Mr. Latneau has not established that the error is clear as a matter of law because Mr. Latneau has not cited to a case holding that the possibility of a no contact order is a direct consequence of a plea. (Respondent's Brief, p.6.) In light of *Jeppesen's* holding, that a no contact order is part of a sentence, Mr. Latneau has clearly established that the no contact order is a direct consequence of his plea.

The State also argues that Mr. Latneau has failed to establish clear error on the record because additional evidence would be necessary to establish that the lack of an objection was not tactical and Mr. Latneau had an incentive to not challenge the validity of the guilty plea to avoid undoing the plea. (Respondent's Brief, pp.6.) Contrary to the State's position, had Mr. Latneau objected to the no contact order at the rider review hearing, Mr. Latneau's remedy would not undo the plea agreement. As stated in the Appellant's Brief, in instances where an otherwise voluntary and intelligently made plea was entered, and one of the direct consequences of the plea deemed invalid, the appropriate remedy is to strike that consequence from the sentence. (Appellant's Brief, p.5 (citing *State v. Banuelos*, 124 Idaho 569, 573 (1993).) Here, the State requested the

no contact order for the first time at the rider review hearing. (12/21/10 Tr., p.11, Ls.18-20.) Had Mr. Latneau objected to the no contact order, and prevailed on that objection, Mr. Latneau's remedy would not have been withdrawal of his plea. Instead, the district court would not have entered the order. [4] Therefore, there was no strategic reason to avoid objecting at the rider review hearing, because the remedy he would have received at that hearing is the same remedy we would receive on direct appeal.

The State also argues that the error was not clear because Mr. Latneau failed to prove he was ignorant of the possibility of a no contact order even though the district court's failure to inform him functions as a *prima facie* showing that the plea is invalid. (Respondent's Brief, pp.6-7.) The State's position is illogical. If Mr. Latneau made a *prima facie* showing that his plea was invalid, it would be illogical to require him to provide additional facts to support his *prima facie* showing. It would be more logical to shift the burden on the State and require it to prove a fact that rebuts the *prima facie* showing.

Additionally, the State's position is not supported by I.C.R. 11(c), which requires that the record demonstrate that the defendant was informed of the direct consequences of the plea. The language contained in I.C.R. 11(c) follows:

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[4] Had Mr. Latneau objected to the no contact order based on a theory that the State breached its plea agreement, and had he prevailed on that issue, the appropriate remedy would have been *either* specific performance of the agreement *or* withdrawal of his plea. *State v. Doe*, 138 Idaho 409, 411 (Ct. App. 2003). In *Doe*, the State was deemed to breach the plea agreement by recommending restitution. *Id.* Since, Doe had completed his sentence, the Court of Appeals said it would be unjust to have Doe withdraw his plea and possibly be tried and resentenced for the same offense. *Id.* So the Court required specific performance and reversed the restitution order. *Id.* Therefore, there would have been no strategic reason to avoid objecting on this basis because Mr. Latneau could elect for specific performance and avoid withdrawing his plea.

> (c) Acceptance of Plea of Guilty. Before a plea of guilty is accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:
>
> . . .
>
> (2) The defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.

Idaho Criminal Rule 11(c) requires that the record demonstrate that Mr. Latneau was informed about the possibility of the no contact order. Here, the record does not establish that Mr. Latneau was informed about the possibility of a no contact order. Since Mr. Latneau has made his *prima facie* showing that his plea was invalid, which comports with I.C.R. 11(c), it should be the State's burden to establish that he did in fact understand that a no contact order could be ordered as a consequence of his plea.

Concerning the third prong of the fundamental error standard, the State argues that Mr. Latneau was not prejudiced because there is no reason to believe knowledge of the no contact order would have changed his plea, and, therefore, there is no reason to believe the district court's failure to warn him about the possibility of the no contact order would have changed the outcome of the proceedings. (Respondent's Brief, p.7.) The State's focus on changing the outcome of the plea negations and the change of plea hearing is misplaced because Mr. Latneau could not have objected to the alleged error until the rider review hearing. Therefore, the real question is whether the error changed the outcome of the rider review hearing, not the change of plea hearing. In that regard, the fact that the no contact order was entered is prejudicial because Mr. Latneau can neither communicate nor have any other form of a relationship with his

children. Therefore, the prejudice occurred at the rider review hearing when the district court entered of the no contact order.

In sum, Mr. Latneau has established that the district court's failure to inform him about the possible consequences of his guilty plea constitutes fundamental error because the no contact order is actually part of his sentence and is, therefore, a direct consequence of his guilty plea. Since *Jeppesen*, *supra*, establishes that the no contact order is part of the sentence, that error is clear. Mr. Latneau was prejudiced because he was ambushed at the rider review hearing with the State's recommendation for a no contact order and he currently is precluded from having any contact with his children.

II.

The District Court Violated Mr. Latneau's Procedural And Substantive Due Process Rights When It Entered A No Contact Order Which Unduly Restricts His Fundamental Right To Parent

A. Introduction

In his Appellant's Brief, Mr. Latneau argued that the district court's no contact order was tantamount to an order terminating his fundamental right to parent. (Appellant's Brief, pp.6-15.) Mr. Latneau then argued the district court infringed on his procedural due process rights when it failed to provide him notice and a hearing before entering the no contact order. (Appellant's Brief, pp.6-13.) Mr. Latneau also argued that the no contact order implicates his substantive due process rights and, therefore, strict scrutiny applies, which requires that the no contact order be narrowly tailored to meet both the State's interest in protecting the children and Mr. Latneau's parental rights. (Appellant's Brief, pp.13-15.) Mr. Latneau then submitted that the no contact

order could have struck this balance by allowing Mr. Latneau supervised visitation with his children. (Appellant's Brief, pp.13-15.)

In response, the State argues that Mr. Latneau's procedural due process rights were not violated because the no contact order is limited in time and scope and because it will be modified based on the outcome of the divorce proceedings. The State also argues that Mr. Latneau's substantive due process claim fails because he never carefully described the right to parent.

In rebuttal, Mr. Latneau argues that a seven year no contact order does prevent him from exercising his parental rights and that the assumption that the divorce proceedings will lead to an alteration of the no contact order does not remedy the fact the no contact order was entered without any procedural protections. Mr. Latneau also argues that the right to parent has been firmly established as a fundamental right and that the careful description requirement is only applicable when a party is trying to establish a new fundamental liberty interest, *i.e.*, one which has not been previously recognized.

B. The District Court Violated Mr. Latneau's Procedural And Substantive Due Process Rights When It Entered A No Contact Order Which Unduly Restricts His Fundamental Right To Parent

The State asserts that Mr. Latneau's due process claims do not amount to fundamental error. (Respondent's Brief, pp.8-12.) On the first prong of the fundamental error analysis, the State specifically argues that Mr. Latneau failed to establish his parental rights were terminated because "[t]he no contact order is limited in time and scope, with the court specifically exempting from the no contact order any contact

allowed in the divorce action between [Mr. Latneau] and his children. (Respondent's Brief, pp.9-11.)

This argument is without merit because Mr. Latneau's right to parent, which includes the ability to communicate with his children, was immediately infringed upon by the entry of the no contact order. *See Webb v. Webb*, 143 Idaho 521, 525-526 (2006) (visitation rights to one's children are a subset of a parent's general custodial rights); *see also Matter of Matthews*, 97 Idaho 99, 104 (1975) (implicitly holding that visitation rights include a right to communicate) (*superseded by statute on unrelated grounds*). As argued in Section I(B), *supra*, the State's position assumes that the district court abdicated its control over the no contact order to the divorce court. However, no such abdication occurred and the district court has yet to modify the no contact order to enable Mr. Latneau to have contact with his children. Moreover, there is no guarantee the district court will modify the no contact order in the event the divorce proceedings are abandoned or if the divorce decree provides Mr. Latneau with legal and/or physical custodial rights. A continued infringement of Mr. Latneau's right to parent should not be upheld based on a speculative statement that at some point in time it might be remedied.

The State does accurately point out that the no contact order is limited in time and scope. (Respondent's Brief, p.9.) However, those facts do not alter any of the due process analysis contained in the Appellant's Brief because it is in effect for approximately seven years. (R., p.58.)

Additionally, the Idaho Supreme Court has provided general guidance pertaining to the various due process concerns which are raised when a temporary no contact

order inhibits parental rights. In *Ellibee v. Ellibee*, 121 Idaho 501 (1992), Mrs. Ellibee alleged that Mr. Ellibee had physically abused their son and requested an *ex parte* order restraining Mr. Ellibee from having any contact with their children. *Id.* at 502. A hearing was scheduled and both parties were represented by counsel. *Id.* After evidence was presented, the magistrate entered a ninety day no contact order pursuant to the Domestic Violence Crime Prevention Act (*hereinafter,* DVCPA), I.C. § 39-6301 *et seq.* *Id.* The order provided Mrs. Ellibee with temporary custody of the couple's children, and provided Mr. Ellibee with supervised visitation rights. *Id.* Mr. Ellibee appealed to the district court and, after the district court affirmed the magistrate's order, he appealed to the Idaho Supreme Court. *Id.*

On appeal, one of the issues before the court was the applicable standard of proof in a protection order proceedings because the DVCPA did not specify a standard. *Id.* at 505. Mr. Ellibee argued, in reliance on *Santosky v. Kramer*, 455 U.S. 745 (1982), that the standard of proof should be clear and convincing "because his fundamental liberty interest as a natural parent was being circumscribed." *Id.* In rejecting Mr. Ellibee's position, the Idaho Supreme Court reasoned that the applicable standard of proof "reflects the weight ascribed to competing interests, and it embodies a societal judgment about how the risk-fact finding error should be allocated." *Id.* (quoting *Hofmeister v. Bauer*, 110 Idaho 960, 963 (Ct. App. 1986)). The Court then held:

> The risk of fact-finding error in the case at hand is less likely than where actual termination of parental rights is concerned. This is a given due to the relatively short duration of any court order restricting contact by a parent. The protection order at issue before this Court *temporarily modified* [Mr. Ellibee's] custody rights; it did not terminate either his parental rights or his custody rights.
>
> . . .

> In the present situation, the custody restriction is limited to no more than ninety days in duration; in fact, a permanent change in custody is not obtainable under the Domestic Violence Act. Considering the need for prompt relief, and the fact that the preponderance of the evidence standard is adequate in instances of permanent alteration of custody rights, the preponderance of the evidence is certainly a sufficiently demanding standard to protect the due process rights of a respondent in a case of short-term custody restriction. [Mr. Ellibee] was given notice of the hearing, and was represented by counsel.

Id. at 505-506. (original emphasis). While the Idaho Supreme Court did not think clear and convincing evidence was an appropriate standard, the reasons for its rejection provides guidance in this matter. The Supreme Court did consider the issuance of the no contact order as a disruption of Mr. Ellibee's parental rights.[5] That conclusion rebuts that State's assertion that the no contact order does not infringe on Mr. Latneau's parental rights. (Respondent's Brief, pp.9-11.) The Supreme Court also noted that Mr. Ellibee was provided with notice of the hearing and was represented by counsel. Implicit in that factual finding, is that the basic requirements of due process, notice and a hearing, are necessary when parental rights are at issue.

However, there are glaring differences between the no contact order in *Ellibee* and the no contact order entered against Mr. Latneau which demand heightened due process protections for Mr. Latneau. Mr. Latneau's no contact order lasts for seven years as opposed to ninety days and Mr. Latneau cannot communicate with his children

[5] Mr. Latneau recognizes that the Supreme Court drew a distinction between custodial rights and parental rights in *Ellibee*, when it stated "[t]he protection order at issue before this Court *temporarily modified* [Mr. Ellibee's] custody rights; it did not terminate either his parental rights or his custody rights." *Ellibee*, 121 Idaho at 505. (original emphasis). However, this distinction is meaningless in light of the United State's Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57, 65 (2000), where it was held that the right to parent "is perhaps the oldest of the fundamental interests recognized," and includes "the interests of the parents in the care, custody, and control of their children . . . ."

outside of legal proceedings. (R., p.58.) With those distinctions in mind, the no contact order entered against Mr. Ellibee only modified his custody rights because he retained the ability to have supervised visits with his children, even though his son was the victim of the domestic violence.[6] Due to these differences, Mr. Latneau's no contact order is more like an order terminating parental rights, as opposed to Mr. Ellibee's no contact order which is akin to an order temporarily altering his custodial rights. Due to this difference, Mr. Latneau should have been afforded the heightened due process protections provided to parents during termination proceedings.

Additionally, one of the most important distinctions between the procedures utilized in *Ellibee* and those in this case, is that Mr. Ellibee was provided with notice and a hearing. On the other hand, Mr. Latneau was not provided with notice and a hearing because he was ambushed by the State's request for the no contact order at the rider review hearing. See *Banuelos*, 124 Idaho at 573 (defendant's due process rights were violated as the defendant was not provided notice or a meaningful opportunity to respond to the State's motion for restitution because it was filed one day before the sentencing hearing). Mr. Latneau was not provided notice and a hearing, and the fact that the no contact order was requested at the rider review hearing did not afford Mr. Latneau the time to prepare a defense to that request. While dealing with different facts, the United States Supreme Court has held that the due process clause of the Fourteenth Amendment requires "a hearing when the issue at stake is the

[6] In this matter, Mr. Latneau's children were not the victims of the domestic abuse. (R., pp.23-24.)

dismemberment of a [parent's] family." *Stanley v. Illinois*, 405 U.S. 645, 657-658 (1972).

The State has also argued that Mr. Latneau's procedural due process rights were not violated because the no contact order might be modified, at some point to reflect the results of the divorce proceedings and Mr. Latneau will be provided due process protections during those proceedings. (Respondent's Brief, pp.9-11.) Contrary to the State's position, a divorce action cannot function as a substitute for parental termination proceedings. First, the factors used to determine legal and physical custody in a divorce proceeding are different from the factors used in a termination proceeding. Idaho Code Section 32-717 contains the following factors which are used in a divorce proceeding:

> (1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include:
>
> (a) The wishes of the child's parent or parents as to his or her custody;
>
> (b) The wishes of the child as to his or her custodian;
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
>
> (d) The child's adjustment to his or her home, school, and community;
>
> (e) The character and circumstances of all individuals involved;
>
> (f) The need to promote continuity and stability in the life of the child; and
>
> (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

The following factors are used in a termination proceeding:

> (1) The court may grant an order terminating the relationship where it finds

> that termination of parental rights is in the best interests of the child and that one (1) or more of the following conditions exist:
> (a) The parent has abandoned the child.
>
> (b) The parent has neglected or abused the child.
>
> (c) The presumptive parent is not the biological parent of the child.
>
> (d) The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child.
>
> (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

I.C. § 16-2005. While somewhat interrelated, these separate factors require different inquiries. In the divorce action, the main focus appears to be on the wishes and interests of the child and only one factor focuses on a parent's fitness as a parent. Additionally, the divorce court does not have to make any factual findings when determining custody and custodial decisions are reviewed for an abuse of discretion. *Hoskinson v. Hoskinson*, 139 Idaho 448, 455 (2003). Conversely, the termination statute focuses on the fitness of the parent and requires factual findings which are supported by clear and convincing evidence. I.C. § 16-2009. Due to those differences and the other procedural protections provided in the termination statute and identified in the Appellant's Brief (Appellant's Brief, pp.6-13), the extent of Mr. Latneau's no contact order and his concomitant parental rights are not appropriately determined in divorce court proceedings. *See also Kottsick v. Carlson*, 241 N.W.2d 842 (N.D. 1976) (holding that divorce proceedings cannot replace termination proceedings for an unwed father because too many due process questions would arise).

Additionally, a unique due process problem arises when the no contact order precedes either a divorce action or an actual termination action, because the no contact

order can be used against Mr. Latneau in those proceedings. For example, in divorce proceedings one of the factors listed in the statue includes the amount of interaction between the child and the parent. I.C. § 32-717(1)(c). In termination proceedings:

> In cases where the parent is incarcerated, we will consider several factors in determining whether termination is in a child's best interests including, among other things, the nature and circumstances of the offense that led to incarceration, prior charged or uncharged criminal behavior while in the home, previous incarcerations and rehabilitations, the impact incarceration has had on the child's well-being, and the quality of contacts or efforts made by the parent to keep a meaningful relationship with the child.

Idaho Dept. of Health & Welfare v. Doe, 151 Idaho 605, 611 (Ct. App. 2011) (emphasis added). Under circumstances like Mr. Latneau's, where a no contact order is entered prior to divorce or termination proceedings, the parent's inability to communicate with his/her children can be used as a justification to either deny custody or terminate parental rights. The use of a no contact order not only caused an immediate infringement on Mr. Latneau's parental rights, but it also caused other due process problems because it can be used against him in future proceedings.[7]

The State also argues that Mr. Latneau's Constitutional rights were no violated because his conviction for domestic violence was proven beyond a reasonable doubt, which refutes any claim that the State failed to establish he was an unfit parent by the lower clear and convincing standard. (Respondent's Brief, pp.9-10.) The fact that Mr. Latneau pleaded guilty to domestic violence does not in and of itself mean he is an unfit parent. *See Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (the right to parent

[7] The State also argues that Mr. Latneau failed to argue that he is a fit parent. (Respondent's Brief, p.9.) Mr. Latneau asserts that he is a fit parent. Moreover, Mr. Latneau's fitness as a parent has never been litigated or otherwise determined. In fact, the State's argument only highlights the district court's infringement of Mr. Latneau's procedural due process rights.

"does not evaporate simply because they have not been model parents . . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life"). While it would be appropriate for a court to use Mr. Latneau's conviction for domestic violence against him in termination proceedings, the termination statue requires a factual finding beyond a single criminal conviction. Specially, the termination statute requires a district court to find that termination is in the best interest of the child and find another factor enumerated in I.C. § 16-2005. Those two factual findings would have to be supported by clear and convincing evidence. I.C. § 16-2009. Even in the context of divorce proceedings, the fact that a parent has been convicted of domestic violence is only one of the seven factors used to determine custody. I.C. § 32-717. Mr. Latneau's conviction for domestic violence alone does not satisfy the procedural requirements necessary to terminate his parental rights.

The State also argues that Mr. Latneau's substantive due process argument is without merit because Mr. Latneau "failed to provide a careful description of his fundamental right," and failed to establish "that such right was infringed by government action not narrowly tailored to the governmental interest." (Respondent's Brief, p.10.) In support of that assertion that State argues that "[t]here is no reason to believe that Mr. Latneau will have visitation in prison and he has not established a right to visitation beyond the scope of any eventual divorce decree." (Respondent's Brief, p.10) The State's position is without merit because it confuses the distinction between establishing the existence of a right with Mr. Latneau's actual ability to exercise that right. In support of its argument, the State cites to *Washington v. Glucksberg*, 521 U.S. 702 (1997). The

issue in that case was whether the substantive due process protection should be *expanded* to include a fundamental right to assisted suicide. *Id.* at 705-705, 719-736. While addressing this issue, United States Supreme Court began its analysis by identifying the following rights as firmly established fundamental rights:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity, and to abortion. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

Id. at 719-720 (emphasis added). After the court identified the right to parent as one of the previously established fundamental rights, it set forth the following standards which apply when a party is advocating for the recognition of an additional fundamental right:

> But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.
>
> . . .
>
> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted

> fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores,*[8] the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Id. at 720-721 (citations omitted) (underlined emphasis added) (italicized emphasis in original). When a party is advocating for a "new" fundamental right one of their tasks is to provide a "careful description" of the asserted fundamental liberty interest. Here, Mr. Latneau is not advocating for this Court to identify a new fundamental liberty interest, instead, he is identifying an infringement of the fundamental right to parent which was identified as a fundamental right in *Glucksberg*. *See also Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). Had Mr. Latneau been advocating for this Court to recognize a new fundamental right, he would then have the burden of carefully describing that right, however, that is not the case here. Therefore, the State's argument that Mr. Latneau has failed to clearly identify the right he is asserting, is specious and belied by the State's own authority.

The State also argues that Mr. Latneau has no ability to exercise his parental rights because he is incarcerated. (Respondent's Brief, pp.10-11.) However, Mr. Latneau is currently on parole,[9] which means his custody is no longer a factor. Assuming that Mr. Latneau was currently incarcerated, there are many means he could

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[8] *Reno v. Flores*, 507 U.S. 292, 302 (1993).

[9] Mr. Latneau's parole status can be found by searching with his offender number, 97395, at https://www.accessidaho.org/public/corr/offender/search.html.

employ to communicate with his children; he could write to his children, he could speak with his children over the telephone, and his children could visit him in prison. Mr. Latneau could also exercise parental rights in prison beyond visitation rights, such as providing input in medical, contractual, and educational. In fact, Mr. Latneau could exercise a panoply of parental rights from prison.

Turning to the second prong of the fundamental error standard, the State argues that Mr. Latneau has not cited "to any case which providing that he is entitled to the level of process he claims under circumstances even arguably similar to his own." (Respondent's Brief, p.11.) Contrary to the State's assertion, the *Ellibee* opinion, *supra*, indicates that a similar no contact order does infringe on the right to parent. The *Troxel* and *Glucksberg* opinions both indicate that the right to parent is fundamental. The procedural and substantive due process errors are clear. Mr. Latneau's fundamental right to parent has almost been completely severed for a period of seven years, without any notice or hearing.

The State also argues that the error is not clear because the lack of on objection could have been a tactical decision because the court allowed Mr. Latneau to litigate his parental rights in the divorce court. (Respondent's Brief, p.11.) This argument has no merit because the existence of the no contact order would not have provided Mr. Latneau any benefits in the divorce proceedings. Moreover, since the amount of contact Mr. Latneau has with his children is a factor a divorce court can consider in custody proceedings, the existence of the no contact order would only hurt him in a divorce proceeding. *See* I.C. § 32-717.

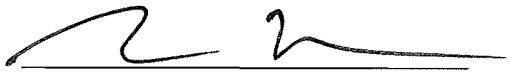
On the last prong of the fundamental error standard, the State repeats its prior arguments that Mr. Latneau was not prejudiced because he cannot exercise his parental rights in prison and because he can litigate his custody issues in the divorce proceedings. These arguments have already been addressed in both Sections I and II of this brief and will not be repeated here. However, Mr. Latneau does submit that his inability to communicate with his children is severely prejudicial not only to him, but also to his children who have had their father abruptly taken away from them. He cannot even explain to them why he is gone and why he does not speak with them. The psychological damage this no contact order has likely caused his children might be irreparable.

In sum, the fact that Mr. Latneau was incarcerated, and the fact the district court said it might modify the no contact order to reflect the outcome of the divorce proceedings have no bearing on the fact that Mr. Latneau's fundamental parental rights were effectively terminated without any process by the entry of the no contact order. As the record currently stands, Mr. Latneau is on parole and the no contact order has been quashed in regard to the victim, Mrs. Latneau. However, Mr. Latneau still cannot speak with his children.

CONCLUSION

Mr. Latneau respectfully requests that this Court strike the no contact order in regard to his children R.L. and C.L.

DATED this 9th day of May, 2012.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

NOAH LATNEAU
2651 W CAMINO DEL SUR
TUCSON AZ 85742-9610

DARLA S WILLIAMSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

LAURENCE G SMITH
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
BOISE, ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

SFW/eas